Supreme Court, U.S.
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No. 08-

08-920

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IN THE

Supreme Court of the United States

BRYAN MEDIA, INC.,

Petitioner,

v.

THE CITY OF ST. PETERSBURG, a municipal corporation, RON GUYNN, GARY BUSH and RON BARTON, each individually and in their official capacity as employees of the City of St. Petersburg,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state-created right to be notified and heard to defend the legality of a billboard prior to its removal creates a protected property interest under the procedural category of the Due Process Clause?

2. Whether the government can deliberately trespass on private property and destroy personal property located thereon without paying just compensation to the owner of the personal property?

3. Whether, when the government moves for summary judgment in a Section 1983 case, the non-moving party must adduce evidence of government culpability where the government has failed to foreclose the possibility that it did not act beyond mere negligence?

4. Whether government inconvenience alone is sufficient to invoke a post-deprivation remedy to vitiate a due process violation?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Bryan Media, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was not reported. The Eleventh Circuit affirmed the December 11, 2006 decision of the United States District Court for the Middle District of Florida. *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eleventh Circuit's Opinion was rendered on September 12, 2008. The Petition for Panel Rehearing was denied on October 20, 2008, and a mandate was issued October 28, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner brought the underlying action pursuant to the Fifth and Fourteenth Amendments of the Constitution, which read as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Bryan Media, Inc. ("Bryan") is an outdoor advertising company that owns two adjacent billboards on a vacant lot at 498 22nd Street S., St. Petersburg, Florida (the "Billboards"). Appendix A at p. 4-6 ("APP – p. #"). CSX Railroad Company owned the vacant lot and leased relevant portions of it to Bryan or its predecessor to erect and maintain the Billboards. *Id.*

Bryan's predecessor, Empire Advertising of Florida, Inc. ("Empire"), originally erected the billboards in July of 1963. At that time, Seaboard Air Line Railroad Company ("Seaboard RR") owned the Property. Seaboard RR became CSX Railroad Company on or about 1986. *Id.* Bryan purchased the billboards in March 2003. *Id.* Bryan and its predecessors have

maintained the Billboards on the vacant lot in substantially the same condition for over 44 years. During this time, the City of St. Petersburg never cited the Billboards for any City Sign Code violations until August 2004.

The gravamen of Bryan's claim here is that on or about January 2004 the City of St. Petersburg destroyed Bryan's Billboards without providing Bryan any notice and without paying Bryan just compensation.

Between the summer and early fall of 2003, Ronald Barton ("Barton"), as Director of Economic Development for the City, began investigating the legality of the Billboards. *Id.* at 6. On December 2, 2003, he learned that CSX Railroad was leasing the land to Bryan. *Id.* Barton researched whether the Billboards had valid permits, and he learned from other City employees that no one could find any permits for the Billboards. *Id.* at 7.

The City's interest in the Billboards' location stemmed from the City's decision to use the land next to the Billboard, which the City owned, to erect its own large sign monument, which advertised the entrance to the City's new sixteen-acre Dome Industrial Park. *Id.* at 4. Essentially, the Billboards were in the wrong place at the wrong time. On or about January 14, 2004, a construction crew, which the City retained to erect its monument, arrived at the subject location and determined that the Billboards blocked their access to the location where City planned to install the new monument. Barton, without notice to Bryan, instructed the construction crew to remove the Billboards. The

construction crew proceeded to knock down the Billboards and leave them on the ground in pieces. *Id.* at 6.

Barton instructed the construction crew to remove the Billboards despite possessing actual knowledge that the City had not provided any due process to Bryan regarding the legality of the Billboards. The City did not notify Bryan that it was about to remove the Billboards, that it had already removed the Billboards, or that Bryan had a right to present evidence to the City's Code Enforcement Board about the legality of the Billboards. In addition, the City never compensated Bryan for the damaged Billboards despite Bryan's repeated requests.

On October 17, 2005, Bryan filed the current action, alleging, *inter alia*, that the City violated the Fifth and Fourteenth Amendments of the Constitution. According to the Complaint, the City failed to compensate Bryan for the Billboards and to notify Bryan both prior to destroying the Billboards and after their destruction.

On October 27 and November 21, 2005, the City, Gary Bush, Ron Guynn and Ron Barton filed respective Motions to Dismiss or in the alternative for summary judgment of the Complaint. On November 10, 2005, Bryan filed its Memorandum of Law in Opposition to the City's and Bush's and Guynn's Motions for Summary Judgment. On December 6, 2005, Bryan filed its Memorandum of Law in Opposition to Ron Barton's Motion for Summary Judgment. On December 11, 2006, the Court entered an Order granting summary judgment for all Defendants on all counts.

Petitioner filed its Notice of Appeal on January 10, 2007. The Eleventh Circuit's decision affirming the lower court's Order was entered on September 12, 2008. Petitioner timely filed its Petition for Panel Rehearing. On October 20, 2008, the Eleventh Circuit denied the Petition for Panel Rehearing.

REASONS FOR GRANTING THE PETITION

Review is warranted because this Court's guidance is necessary to answer the question whether a state-created right to be heard and to defend the legality of a billboard prior to its removal creates a protected property interest under the procedural category of the Due Process Clause of the Fourteenth Amendment of the Constitution.

The Court's guidance is also needed regarding the question whether the government can deliberately trespass on private property and destroy personal property without paying the personal property owner just compensation. This question implicates this Court's and this Country's most cherished and time-honored principles of compensable takings, due process and fair play. The Eleventh Circuit's decision is in conflict with decisions by the Supreme Court of Florida, the Fifth Amendment of the Constitution, and this Court's long-standing interpretation of its meaning in connection with the facts of this case.

Review by this Court is also necessary to provide guidance on the application of Rule 56 of the Federal Rules of Civil Procedure where, as here, the record shows the presence of governmental action that goes

beyond negligence and shows intent to deprive a citizen of its rights under the Fifth Amendment of the Constitution. The Eleventh Circuit's decision presupposes an application of Rule 56 in conflict with this Court's summary judgment standard.

I. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S HOLDING THAT THE PETITIONER LACKED A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST CONFLICTS WITH THIS COURT'S LANDSCAPE OF PROTECTED PROPERTY INTERESTS UNDER THE PROCEDURAL CATEGORY OF THE DUE PROCESS CLAUSE.

Bryan asserted that the Respondent violated the procedural component of the Due Process Clause when Respondent tore down Bryan's Billboards without providing any prior notice. The district court held, and the Eleventh Circuit affirmed, that the City did not violate Bryan's right to procedural due process because Bryan did not have a constitutionally protected property interest at the time the City tore down the Billboards. However, as set forth below, Bryan had a property interest in the state-created right to notice and a hearing before the City's Code Enforcement Board to defend any alleged code violations prior to governmental corrective action.

This Court has long held that "the procedural component of the Due Process Clause does not protect everything that might be described as a "benefit": "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire"

and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005), quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such entitlements are, "'of course . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Gonzales*, 545 U.S. at 756, quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976) (quoting *Roth, supra*, at 577); see also *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998).

In affirming summary judgment against Bryan on its due process claim, the Eleventh Circuit relied on the Florida Supreme Court case of *Department of Transportation v. Durden*, 471 So.2d 1271 (Fla. 1985) to determine whether Bryan had a protected property interest. *See* App. at 2. The Eleventh Circuit held that Bryan did not have a protected property interest because under *Durden* a billboard permit is a *condition precedent* for the billboard owner to have a property right in leasing advertising space thereon. *Id.*

The Eleventh Circuit's decision, however, construes the nature of a protected property interest too narrowly in light of this Court's landscape of constitutionally protected property interests. *See generally*, Merrill, *The Landscape of Constitutional Property*, 86 Virginia L. Rev. 885 (2000). In *Bd. of Regents of State of Colleges v. Roth*, 408 U.S. 564, 577 (1972), this Court held that property interests "are created and their dimensions are defined by existing rules or understandings that

stem from an independent source such a state law—rules or understandings *that secure certain benefits* and that support claims of entitlements to those benefits." *Roth*, 408 U.S. at 577. (emphasis added).

Here, the existing rules that create and define Bryan's property interest are contained in Florida's "Local Government Code Enforcement Boards Act," see Fla. Stat. § 162.01 *et seq.* (2004), and more specifically set forth in the St. Petersburg City Code (codified through 1992) ("City Code"). These rules mandate that if a City Code violation is found, then the city code inspector must notify the alleged violator and give him a reasonable time to correct the violation. If the violation goes uncorrected, the inspector must notify the Board and the Board must schedule a hearing for the violator to explain why the correction has not been made or to defend against it.

Section 162.06, Florida Statutes (2004), "Enforcement Procedures," states in pertinent part:

> (1) It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes; however, no member of a board shall have the power to initiate such enforcement proceedings.
>
> (2) Except as provided in subsections (3) and (4), if a violation of the codes is found, the code inspector *shall* notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue beyond the time specified for correction, *the*

code inspector shall notify an enforcement board and request a hearing. The code enforcement board, through its clerical staff, *shall schedule a hearing*, and written notice of such hearing shall be hand delivered or mailed as provided in s. 162.12 to said violator. At the option of the code enforcement board, notice may additionally be served by publication or posting as provided in s. 162.12. If the violation is corrected and then recurs or if the violation is not corrected by the time specified for correction by the code inspector, the case may be presented to the enforcement board even if the violation has been corrected prior to the board hearing, and the notice shall so state.

(3) If a repeat violation is found, the code inspector shall notify the violator but is not required to give the violator a reasonable time to correct the violation. The code inspector, upon notifying the violator of a repeat violation, shall notify an enforcement board and request a hearing. The code enforcement board, through its clerical staff, shall schedule a hearing and shall provide notice pursuant to s. 162.12. The case may be presented to the enforcement board even if the repeat violation has been corrected prior to the board hearing, and the notice shall so state. If the repeat violation has been corrected, the code enforcement board retains the right to schedule a hearing to determine costs and impose the payment of reasonable

> enforcement fees upon the repeat violator. The repeat violator may choose to waive his or her rights to this hearing and pay said costs as determined by the code enforcement board.
>
> (4) If the code inspector has reason to believe a violation or the condition causing the violation presents a serious threat to the public health, safety, and welfare or if the violation is irreparable or irreversible in nature, the code inspector shall make a reasonable effort to notify the violator and may immediately notify the enforcement board and request a hearing.

(emphasis added). Regardless of whether the Code inspector finds an imminent threat to the public or a repeat violator, he must notify the alleged violator, request a hearing before the Board, and the Board must schedule a hearing. Thus, under Florida's code enforcement regime an alleged violator has a right to be notified and a right to a hearing to challenge the validity of the violation.

This right to notification and a hearing confer distinct benefits on the alleged violator because the government official – the code inspector – does not have the discretion to choose not to notify the alleged violator or to request a hearing before the Board; and the Board does not have the discretion to grant or not grant a hearing. *See Gonzalez*, 545 U.S. at 756 *(citing Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-463 (1989) (holding that a benefit is not a protected

entitlement if government may grant or deny it in their discretion)). Thus, the government is granting the alleged violator an entitlement to a hearing to allow him to defend and to protect himself from any premature governmental action, such as removing a billboard when it may be allowed to remain.

This Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-572. The "types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); see also *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings'"). Thus, this Court has found "property" interests in a number of *state-conferred benefits* and services, including welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); disability benefits, *Mathews v. Eldridge*, 424 U.S. 319 (1976); public education, *Goss v. Lopez*, 419 U.S. 565 (1975); utility services, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); government employment, *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), as well as in other entitlements that defy easy categorization, see, *e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971) (due process requires fair procedures before a driver's license may be revoked pending the adjudication of an accident claim); *Logan*, 455 U.S., at 431 (due process prohibits the arbitrary denial of a person's interest in adjudicating a claim before a state commission).

Florida's Local Government Code Enforcement Boards Act confers upon an alleged code violator the *benefit* of a hearing to determine, *inter alia*, the accuracy of the allegation. Consistent with this Court's landscape of protected property interests, Bryan had a property interest in Florida's mandatory notice and hearing regime. The purpose of the notice and hearing is to protect the alleged violator from premature actions by the government. This protection is mandatory under the statute and it confers a distinct benefit upon the recipient. The facts of this case demonstrate its value: had Bryan received proper notice and hearing prior to the government's action of tearing down the Billboards, Bryan would not have had to replace the Billboards or lost six months of revenue while they were down. Thus, this Court should hold that the procedural component of the Due Process Clause includes protecting this state-created notice and hearing benefit as a protected property interest.

II. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S HOLDING THAT PETITIONER LACKED A COMPENSABLE PROPERTY INTEREST UNDER THE TAKINGS CLAUSE CONFLICTS WITH DECISIONS BY THE FLORIDA SUPREME COURT.

Bryan asserts that the City's order to remove the Billboards was a compensable taking under the Taking Clause of the Fifth Amendment. In rejecting Bryan's claim, the Eleventh Circuit determined that Bryan had no cognizable property rights under state law because Bryan did not have a permit for the Billboard.

"The Fifth Amendment prohibits the taking of private property for public use without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001). Implicit in this analysis is the determination of whether there is a cognizable property interest and whether the government took that property interest. The issue here is whether a government's destruction of personal property is a "taking" of that property.

Relying on *Department of Transportation v. Durden*, 471 So.2d 1271 (Fla. 1985), the Eleventh Circuit found that a billboard permit is a *condition precedent* for a compensable property interest in the Billboard. Because Bryan did not have a permit for the Billboard, the Eleventh Circuit concluded that Bryan did not have a compensable property interest. In other words, there was nothing for the government to take away.

However, the Eleventh Circuit's decision rests on a faulty legal conclusion that possessing a permit is the only basis for a compensable property interest in a billboard. It is well established that "[p]roperty interests are created and defined by State law." *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914 (1979); *see also Bd. Of Regents of State of Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972). Under Florida law, a billboard is considered personal property of the billboard owner. *See Hernando County v. Anderson*, 737 So. 2d 569 (Fla. App. 5 Dist., 1999) (holding that billboards are personal property rather than realty). Personal property is a compensable property interest under the Takings Clause. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (finding interest earned in IOLTA accounts compensable property interest

under the Takings Clause). The issue here is whether the Government "takes" personal property when it destroys it. Specifically, whether, as here, the City "took" the Billboards when the City tore them down rather than allowing Bryan the opportunity to remove them. *See Hernando County v. Anderson*, 737 So. 2d 569 (Fla. 5th DCA 1999) (finding County liable for compensation in billboard owners' action for inverse condemnation for destruction of two billboards on property county had leased to owners, where county did not give owners opportunity to remove billboards from realty upon expiration of their leasehold interest, since billboards were considered personal property rather than realty).

The Eleventh Circuit's decision regarding whether the City's destruction of the Billboard was a "taking" requiring just compensation deviates from the most fundamental, long standing precepts of 'takings' jurisprudence established by the Supreme Court of Florida. The Supreme Court of Florida has held that the concept of a 'taking' requiring just compensation derives from cases where the government deliberately trespasses and appropriates private property for its own use. *See Seldon v. City of Jacksonville*, 10 So. 457 (Fla. 1891). Specifically, a government's "appropriation" of the property *may involve an act of destruction* of personal property. *See White v. Pinellas County*, 185 So.2d 468, 471 (Fla. 1966) *(citing State Road Dept. of Florida v. Tharp*, 1 So.2d 868, 870 (Fla.1941); *See also Kirkpatrick v. City of Jacksonville*, 312 So.2d 487 (1st DCA 1975). In *Road Dept. of Florida v. Tharp*, 1 So. 2d

868, 870 (Fla. 1941), the Supreme Court of Florida explained this holding as follows:

> If a State agency can *deliberately trespass on and destroy* the property of the citizen in the manner shown to have been done here and then be relieved from making restitution on the plea of nonliability of the State for suit, then the constitutional guaranty of the right to own and dispose of property becomes nothing more than the tinkling of empty words. Such a holding would raise administrative boards above the law and clothe them with an air of megalomania that would eternally jeopardize the property right of the citizens. It would reverse the order of democracy in this country and head it into a blind alley.
>
> American democracy is a distinct departure from other democracies in that we place the *emphasis on the individual and protect him in his personal property rights against the State* and all other assailants.

Id. (emphasis added).

In *White v. Pinellas County*, 185 So.2d 468, 471 (Fla. 1966), the Supreme Court of Florida held that deliberately trespassing and destroying a citizen's personal property is a "taking" requiring just compensation when the personal property is destroyed for a public purpose. In *White*, a citizen alleged that the government trespassed upon its property, cut down

and destroyed large, valuable trees and shrubs. *Id.* The trial court granted a summary judgment for the government, which the appellate court affirmed. The Florida Supreme Court, however, reversed, holding that when a government trespasses upon property and destroys private property for public use it must pay just compensation. *Id.* The court remanded the case for trial on the factual questions of whether the trees were of value, whether the property was taken for a public purpose and for how much the government should compensate the complainant. *Id.*

Here, the City ordered its contractor to trespass on the CSX Railroad private property and knock down the Billboards. The City did this to give its contractor access to a section of the City's land on which the City was to erect its own sign monument pursuant to the City's plans to redevelop the surrounding blighted area. The Petitioner owned the Billboards. The Petitioner tendered to the City a letter and invoice requesting reimbursement for the damage done to the Billboards, which the City has never paid. Thus, this Court should hold that the City's tearing down of the Billboards was a taking of personal property for public use in violation of the Takings Clause and remand the case for a determination of the value of the property destroyed.

III. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION FINDING THE PLAINTIFF FAILED TO ADDUCE EVIDENCE TO PRECLUDE SUMMARY JUDGMENT CONFLICTS WITH THIS COURT'S SUMMARY JUDGMENT STANDARDS.

Review by this Court is necessary to provide guidance on the application of Rule 56 of the Federal Rules of Civil Procedure where, as here, the record shows the presence of governmental action that goes beyond mere negligence and shows intent to deprive a citizen of its rights under the Fifth Amendment of the Constitution. The Eleventh Circuit's decision presupposes an application of Rule 56 in conflict with this Court's summary judgment precedents.

The Eleventh Circuit's decision states that the "Plaintiff has adduced *no evidence* that the city's actions rose above the level of mere negligence, at most." App–2. (emphasis added). The Eleventh Circuit's holding is contrary to this Court's well-established summary judgment jurisprudence under Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, the Plaintiff does not have the burden to adduce evidence of the City's culpability. The City has the burden, as the moving party, to show an absence of culpability or to adduce evidence excluding the possibility that the City was culpable beyond mere negligence. *See Adickes v. S.H. Kress & Company*, 398 U.S. 144, 161 (1970) (moving party has initial burden to show absence of a genuine issue of material fact).

Rule 56(c) states in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue of material fact.

This Court's cases firmly establish that under Rule 56(c) the *moving party* has the *initial* burden to point out to the court how the pleadings, depositions, etc., raise no genuine issue of material fact. *See Adickes*, 398 U.S. at 161.

On this record, the City did not and could not show "an absence of a genuine issue of material fact." A violation of the Due Process Clause requires proof of two elements: (1) that the state official "deprived" (i.e., culpably denied) a citizen of life, liberty or property and (2) the deprivation occurred without due process of law. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986). This record contains Barton's sworn deposition testimony that "*I gave the contractor permission to remove the sign*" without any prior notice to Bryan (emphasis added), *see* App—7 at ¶ 14.

The Eleventh Circuit's decision is contrary to this Court's summary judgment standard in *Adickes*, 398 U.S. at 157 (1970). On the record below, the City did not meet its initial burden of "foreclosing the possibility" that Barton acted only with "mere negligence" when he gave the order to remove the Billboard. *See id.* Thus, as the non-moving party, Bryan was under no duty to "adduce evidence" that Barton's actions rose above mere negligence.

IV. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS A RADICAL DEPARTURE FROM THIS COURT'S ESTABLISHED JURISPRUDENCE OF POST-DEPRIVATION REMEDY CASES.

In affirming the lower court, the Eleventh Circuit has ruled that the government may use inconvenience to invoke post-deprivation remedies to avoid a due process violation when it has not provided any pre-deprivation notice or hearing. The district court ruled that the City was not required to provide notice and a hearing before it tore down the Billboards because, under the facts of this case, the City provided an adequate hearing after the fact. In affirming, the Eleventh Circuit's decision conflicts with well-established Supreme Court precedent interpreting the criteria allowing a post-deprivation notice and hearing requirements to excuse the lack of pre-deprivation notice and hearing. This Court's review is needed to provide guidance on the question of whether the government's mere inconvenience is sufficient to invoke post-deprivation remedies.

This Court's cases have held that the procedural component of the Due Process Clause of the Fourteenth Amendment requires notice and a fair hearing "*before* the State deprives a person of liberty or property." *See Zinermon v. Burch*, 494 U.S. 113, 127-129 (1990) (emphasis in original). "'The root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest'" *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)

(emphasis in original) (internal citations omitted). *See also Parham v. J.R.*, 442 U.S. 584, 606-607 (1979) (determination by neutral physician whether statutory admission standard is met required *before* confinement of child in mental hospital); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (hearing required *before* cutting off utility service); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (at minimum, due process requires " *some* kind of notice and. . . *some* kind of hearing" (emphasis in original); informal hearing required *before* suspension of students from public school); *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974) (hearing required *before* forfeiture of prisoner's good-time credits); *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (hearing required *before* issuance of writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (hearing required *before* termination of welfare benefits).

This Court has delineated exceptions to this general rule when providing the pre-deprivation hearing is impossible or impracticable, or when the State cannot predict and guard in advance against a deprivation. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (" '[T]he necessity of quick action by the State or the impracticality of providing any pre-deprivation process'" may mean that a post-deprivation remedy is constitutionally adequate, quoting *Parratt v. Taylor*, 451 U.S., 527, 539 (1981)); *Memphis Light*, 436 U.S., at 19 ("[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430

U.S. 651, 682, (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 619-620 (1974) (hearing not required before issuance of writ to sequester debtor's property). In such situations, the State will satisfy a person's due process rights if the State provides adequate post-deprivation hearings or remedies. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

In this case, however, a pre-deprivation hearing was both possible and practicable. The record is replete with any suggestion that any significant public interest was at stake that prevented the City from delaying the installation of its sign monument. Barton's undisputed deposition testimony was that the contractors were at the site and Barton did not want to turn them away. *See* App—7 (providing citations to Barton deposition). The City had been aware that the Billboards were present at the location of the future site of the monument for many months. The City had already spent months investigating whether a permit existed for the Billboards. The City was merely inconvenienced when its contractor arrived at the site and the Billboards were in the way.

This Court's cases, *see supra Logan, Ingraham, Mitchell*, contain no suggestion that mere inconvenience is an allowable criterion for invoking post-deprivation remedies to vitiate procedural due process violations. The consequences for allowing mere inconvenience to excuse the lack of pre-deprivation notice and hearing would be for the exception to swallow the rule, making this Court's pre-deprivation jurisprudence functionally

meaningless. Given the absurdity of this consequence, the Eleventh Circuit's proposition that convenience is an allowable criterion to invoke post-deprivation remedies must be false.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant Review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED SEPTEMBER 12, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-10189

D.C. Docket No. 05-00291 CV-T-MSS

BRYAN MEDIA, INC., a Florida corporation,

Plaintiff-Appellant,

versus

CITY OF ST. PETERSBURG,
a municipal corporation, RON BARTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(September 12, 2008)

Before ANDERSON, BARKETT and HILL, Circuit Judges.

Appendix A

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. With respect to plaintiff's due process and taking claims, we conclude, applying Florida law, that plaintiff had no property interest because it had no permit for the signs. *See Dep't of Transp. v. Durden*, 471 So.2d 1271 (Fla.1985). We do not believe that plaintiff's estoppel argument can give rise to a property interest. Plaintiff cannot satisfy the exceptional circumstances required to apply estoppel against a governmental party. Plaintiff has adduced no evidence that the city's actions rose above the level of mere negligence, at most. Nor has plaintiff adduced evidence of a serious injustice. Finally, we believe that the application of estoppel against the government in this case would give rise to undue harm to the public interest.

We believe that plaintiff's retaliation claim fails because plaintiff has failed to adduce evidence of retaliatory actions by defendants. Rather, citations issued against the plaintiff were issued because plaintiff was in violation of the permitting laws, and there is no evidence that plaintiff was treated differently from others similar situated.

Plaintiff's selective enforcement claims (both federal and state) fail because there is no evidence that plaintiff was targeted or singled out. With respect to the January 2004 removal of plaintiff's sign, the evidence indicates that *only* plaintiff's sign was blocking the imminent

construction work undertaken by the city's contractor. With respect to the six citations for violations issued to plaintiff, the evidence indicates that *all* signs in the park area were investigated, and that citations were also issued with respect to *all* other violators. Moreover, we agree with the court below that plaintiff failed to adduce evidence of invidious motivation.

Plaintiff's other state law claims are rejected without need for further discussion.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION FILED DECEMBER 11, 2006

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 8:05-cv-291-T-MSS

BRYAN MEDIA, INC., a Florida corporation,

Plaintiff,

vs.

CITY OF ST. PETERSBURG, a municipal corporation, RON GUYNN, GARY BUSH, and RON BARTON, each individually and in their official capacity as employees for the City of St. Petersburg,

Defendants.

ORDER

THIS CAUSE comes on for consideration upon the filing of Defendants' Motions to Dismiss or, in the Alternative, Motions for Summary Judgment (the "Motions") (Dkts. 23, 24, 28) and Plaintiff's memoranda in opposition thereto (Dkts. 27, 37). Because the Court has considered material outside of the amended complaint, this matter shall proceed before the Court as a motion for summary judgment.

Appendix B

I. BACKGROUND

The Court previously granted in part and denied in part Defendants' Motions to Dismiss the verified complaint and allowed Plaintiff to file an amended complaint (Dkt. 21). The Court provided a detailed factual background in its previous order and shall restate the undisputed facts that are alleged in Plaintiff's amended complaint (Dkt. 22-1) and the Motions (Dkts. 23,24,28):

1. Bryan Media, Inc. ("Plaintiff or "Bryan Media") is an outdoor advertising company that owns billboards throughout St. Petersburg, Florida which it leases to third parties. Plaintiff does not own the land on which the billboards sit but leases the necessary portion of the land from the respective land owners.

2. On June 28, 1982, Junior Posters, Inc. entered into an agreement with Seaboard Air Line Railroad Company, landowner, through its intermediary Peterson Enterprises of Orlando, Inc. ("Peterson Enterprises"), to lease three different railroad right of way ("RR R/W") parcels of land for the purpose of erecting and maintaining outdoor advertising locations. These properties were: (1) on the corner of 34th Street South and 7th Avenue South, (2) on the corner of 28th Street South and 7th Avenue South, and (3) on the corner of 22nd Street South and 5th Avenue South.

3. On March 8, 1988, Junior Posters, Inc. entered into a supplemental agreement with Peterson Enterprises, then the agent for CSX Transportation, Inc. ("CSX"), the new landowner, increasing the annual rent for the leased land.

4. On May 5, 1988, Tampa Bay Junior Posters, Inc., a corporation owned and operated by the same principals of Junior Posters, Inc., entered into a lease of the same three locations with Outdoor Systems, Inc., the then agent for CSX.

5. On February 27, 2003, Plaintiff entered into an Asset Purchase Agreement with Tampa Bay Junior Posters, Inc. and Junior Posters, Inc. where it purchased "the bulletin structures, lease agreements, permits, contracts and all files related to the sellers' outdoor advertising business in Florida," which included the three RR R/W locations referenced above. (Dkt. 22 ¶ 18)

6. Viacom Outdoor has replaced Outdoor Systems, Inc. as the agent for CSX.

7. At all times relevant to the allegations in the amended complaint, Defendant Ron Guynn ("Guynn" or "Defendant Guynn") was an employee of Defendant City of St. Petersburg (the "City") acting as one of the City's Codes Investigators within the City's Codes Compliance Assistance Department.

8. At all times relevant to the allegations in the amended complaint, Defendant Gary Bush ("Bush" or "Defendant Bush") was an employee of the City acting as the Supervisor of the City's Codes Investigators within the City's Codes Compliance Assistance Department.

9. Between February 2001 and February 2005, Defendant Ron Barton ("Barton" or "Defendant Barton") was an employee of the City acting as the Director for the City's Economic Development and Property Management Department where he served as project manager for the economic redevelopment area known as the "Dome Industrial Park Plan" ("DIPP") and its Pilot Project (the "Pilot Project").

10. The Pilot Project was an economic redevelopment project which consisted of approximately sixteen to nineteen acres of triangularly shaped property in the City "whose right angles met at 5th Avenue South and 22nd Street South and whose hypotenuse was Interstate 75." (Dkt. 22-1 ¶ 21)

11. At the entrance of the Pilot Project, on the "north side of 5th Avenue South," the City had planned to erect a sign monument for the project. (Barton Dep. 13:13-20, September 28, 2005)

12. Defendant Barton noticed two billboards in the CSX RR R/W located on the corner of 22nd Street South and 5th Avenue South in close proximity to the

planned construction of the sign monument for the Pilot Project (the "subject billboards").

13. On December 2, 2003, an employee in the City's Economic Development and Property Management Department contacted CSX to find out whether CSX had leased its property to the owners of the billboards. At that time, the City employee informed CSX that the City did not have permits for either billboard in its records. The City employee also stated that one of the billboards was owned by Bryan Media and the other owner was unknown. In response, an employee for CSX stated that CSX had a contract with Viacom Outdoor for two billboards on the northeast corner of 5th Avenue South and 22nd Street South. This information was relayed to Defendant Barton.

14. Defendant Barton, in his capacity as the Director of the City's Economic Development and Property Management Department, directed that the subject billboards could be taken down. In January 2004, a City contractor informed Defendant Barton that the subject billboards were interfering with the installation of a monument on the Pilot Project site. (Barton Dep. 50:19-51:7)

15. The subject billboards were then taken down by the City's contractor and placed on the ground. Subsequently, an individual from Bryan Media came

to the property, removed the billboards from the project site and placed them in storage.[1]

16. After directing removal of the billboards, Defendant Barton conducted a "windshield survey" where he drove through the project area and denoted the location of other billboards which were located in the DIPP area. (Barton Dep. 56:4-8) On or about April 2004, Defendant Barton passed his findings on to the City's permitting department so that department could determine whether permits had been issued for the billboards.

17. On or about May 27, 2004, an employee for the City responded to Plaintiff's concerns regarding the removal of the subject billboards and informed Plaintiff that the subject billboards were not legally permitted. The employee then told Plaintiff that she had "contacted CSX to see if [Plaintiff] had a lease [with them] and they informed [her] that CSX did not have a lease with Bryan Media." (Dkt. 27-2 at 4)

18. On or about June 30, 2004, Plaintiff re-erected the subject billboards and sent the City a bill demanding reimbursement for the cost of the required repair and payment for the loss of revenue during the time period the subject billboards were down.

19. On August 4, 2004, the City sent Plaintiff a violation notice citing the subject billboards for not having

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1. In this Order, the Court will refer to the City's actions as the "removal."

the proper permits as required by the city codes. Defendant Guynn signed the violation notice sent to Plaintiff for the subject billboards.

20. The City contemporaneously sent seven other violation notices citing billboards located within the DIPP area for not having the proper permits as required by the city codes. Five violation notices were sent to Plaintiff and concerned Plaintiff's other billboards and two violation notices were sent to third parties who owned billboards in the DIPP area. Defendant Bush initiated all eight of the codes compliance cases.

21. On August 19, 2004, Viacom Outdoor sent Plaintiff a letter informing Plaintiff that it had received copies of the violation notices, that Plaintiff had therefore failed to abide by its license agreement with Viacom Outdoor and that Plaintiff was to provide Viacom Outdoor with proof of the requisite permits by August 31, 2004, or risk cancellation of the license agreement.

22. On November 18, 2004, the City's Code Enforcement Board (the "CEB") ruled that the subject billboards were unlawfully erected and that Plaintiff had until December 17, 2004, to correct the violation by submitting its permit or removing the subject billboards. Plaintiff appealed the decision of the CEB.

Appendix B

23. This lawsuit was filed in February 2005 and Plaintiff's amended complaint was filed in October 2005. In the amended complaint, Plaintiff contends that the City and Barton are liable to Plaintiff for selectively enforcing the city codes against Plaintiff (Counts I-III), tortiously interfering with Plaintiff's business relationships with Viacom Outdoor and other businesses advertising on its billboards (Count IV), and for an unconstitutional taking of Plaintiff's property without just compensation (Count VI).[2] Plaintiff further contends that the City is equitably estopped from requiring Plaintiff to acquire and submit permits or remove its billboards (Count V) and seeks injunctive relief (Count VII). Counts I, II, III, V, VI and VII are based on Defendant Barton's January 2004 order directing removal of the subject billboards and the August 2004 violation notices sent by the City to Plaintiff. Count IV is based solely on Defendant Barton's order directing removal. The amended complaint does not specifically allege an act or failure to act on the part of Defendants Guynn and Bush and makes no federal or state claims against them in their individual or official capacities.

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2. It is unclear to the Court whether Count VI, Plaintiff's unconstitutional takings claim, is alleged against the City and Defendant Barton as indicated in the amended complaint (Dkt. 22-1 at 14) or solely against the City as Plaintiff states in its response to the City and Defendants Guynn and Bush's Motions for Summary Judgment (Dkt. 27-1 at 8). For the purposes of this Order, the Court will follow the language in the amended complaint and assume that the unconstitutional takings claim is alleged against the City and Defendant Barton.

24. In January 2006, the Sixth Judicial Circuit of the State of Florida granted certiorari. The court quashed the November 2004 written decision of the CEB for the CEB's failure to abide by its oral decision which gave Plaintiff thirty days to locate a permit for the subject billboards and remanded the matter back to the CEB.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). "The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case as to which the nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 351 (11th Cir. 1989). Mere allegations of denial are insufficient to meet the burden of opposing summary judgment, and the party resisting summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In evaluating a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 255 (1986). Credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are functions of the jury; therefore, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in the nonmovant's favor. *See id.* at 248.

Finally, the relevant rules of substantive law dictate the materiality of a disputed fact. Thus, the decision of summary judgment in this case must be made with reference to the standard of proof applicable to the claims on which the motion is brought. *See Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1527-1528 (11th Cir. 1987).

III. DISCUSSION

Against this standard, Defendants request that judgment be entered in their favor and against Plaintiff as to all counts in the amended complaint. In its Motion (Dkt. 23), the City contends that: (1) Counts I and III, Plaintiff's selective enforcement claims against the City, should be dismissed because in Count I Plaintiff failed to identify a constitutional right or a policy or custom of the City that is the moving force behind the constitutional violation. Further, the City contends that the initial removal of the subject billboards was due to exigent circumstances and, aside from that removal, Plaintiff was afforded notice of the violations and an opportunity to be heard by the CEB. Regarding Count III, the City contends Plaintiff has failed to allege that enforcement of the city codes was based on an

unjustifiable or arbitrary classification under Florida law; (2) Count IV, Plaintiff's tortious interference with business relationships claim, should be dismissed because the City is immune from liability for intentional torts allegedly committed by its employees. Further, the City contends that Defendant Barton's directive to remove the subject billboards was merely a negligent or consequential interference, if an interference at all; (3) Count V, Plaintiff's equitable estoppel claim, should be dismissed because to allow the claim would result in the perpetuation of signs that were unlawfully constructed without the presence of extraordinary circumstances justifying their existence; (4) Count VI, Plaintiff's unconstitutional takings claim, should be dismissed because investigating and prosecuting code compliance violations do not constitute a taking; and (5) Count VII, Plaintiff's request for injunctive relief, should be dismissed because all of the other counts should be dismissed.

In his Motion (Dkt. 28), Defendant Barton asserts virtually identical arguments as those asserted by the City. He also contends Plaintiff's claims against him in his official capacity should be dismissed as they are redundant. With respect to Plaintiff's claims against Defendant Barton in his individual capacity, Defendant Barton contends under federal and state law he is immune from suit for actions performed as a government

In their Motion (Dkt. 24), Defendants Guynn and Bush assert that because the amended complaint alleges no specific act or failure to act on their part and makes

no federal or state claims against them in their individual or official capacities, summary judgment in their favor is appropriate.

A. Counts I-III, Selective Enforcement against the City and Defendant Barton.

Plaintiff's first two claims are brought pursuant to 42 U.S.C. § 1983. Plaintiff's third claim is brought pursuant to Article I, Section 2 of Florida's Constitution. Plaintiff alleges the City and Defendant Barton, in his individual capacity, selectively enforced the city codes by removing the subject billboards "to the exclusion of others similarly situated." (Dkt. 22-1 ¶ 42) Plaintiff contends Defendant Barton's directive ordering removal of the subject billboards in January 2004 was in bad faith and invidious because Defendant Barton had actual knowledge that (1) Plaintiff had a land lease with Viacom Outdoor, (2) Plaintiff owned the subject billboards, (3) Plaintiff had not been provided notice of the illegality of the signs or their planned destruction, (4) advertisers were posted on the subject billboards, and (5) there were other unpermitted billboards in the Pilot Project area that had not been investigated for valid permits. Further, Plaintiff contends that the six notices sent by the City in August 2004 citing the subject billboards and Plaintiff's other billboards were "as punishment and in retaliation to" Plaintiff exercising its rights to due process and just compensation, i.e., Plaintiff's June 2004 request for reimbursement and payment of lost revenue. (Dkt. 22-1 ¶ 46)

Appendix B

1. Counts I and II brought under 42 U.S.C. § 1983.

Selective Enforcement

To state a claim for selective enforcement, a plaintiff must "make a prima facie showing that he has been singled out for prosecution although others similarly situated, who have committed the same acts, have not been prosecuted." *Rindley v. Gallagher, et al.*, 890 F. Supp. 1540, 1551 (S.D. Fla. 1995) (citing *Owen v. Wainwright*, 806 F.2d 1519, 1523 (11th Cir. 1986)). Further, a plaintiff must demonstrate that the government's selective prosecution has been "constitutionally invidious." *Id.* The invidiousness requirement is satisfied if it can be established that "the government's selective prosecution is motivated by constitutionally impermissible motives such as racial or religious discrimination or interference with the legitimate exercise of constitutional rights." *Fillingim v. Boone*, 835 F.2d 1389, 1399 (11th Cir. 1988). Under Section 1983, a municipality may generally only be liable when the plaintiff shows that the deprivation of constitutional rights was made pursuant to the municipality's "policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *Brown v. City of Ft. Lauderdale*, 923 F.2d 1474, 1479 (11th Cir. 1991) (citing *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978)). A municipality may also be liable for the acts of an official who "possesses final authority to establish

municipal policy with respect to the action ordered." *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986).

As an initial matter, Plaintiff has presented evidence which shows the City had a policy which provided for the removal of "nonconforming structures" in order to advance the DIPP and its Pilot Project. Plaintiff has introduced a copy of the City's resolution related to the DIPP which was adopted by the City Council on March 18, 1999. The resolution authorized "the Mayor or his Designee . . . to commence the Dome Industrial Park Plan by . . . implement[ing] the Pilot Project to facilitate private development . . . and . . . demolish[ing] non-conforming structures where demolition is necessary and appropriate." (Dkt. 33-5 at 3) As will be discussed below, Defendant Barton was aware of the unpermitted status of at least one of Plaintiff's billboards at the time he ordered removal. Defendant Barton's supervisor stated that while Defendant Barton did not have final policymaking authority concerning the DIPP, he did have "authority to carry out and administer policies of the City and to make discretionary decisions consistent with City policies." (Musset Aff. ¶ 9) Because the City had a policy of demolishing "non-conforming structures" in connection with the DIPP and its Pilot Project, Plaintiff's billboards were non-conforming structures and Defendant Barton had authority to carry out the City's policies, Plaintiff has established that the City may be liable under Section 1983.

Further, the evidence of record supports Plaintiff's contention that Defendant Barton knew, at the time he

ordered removal of the subject billboards, that those billboards were on CSX property, that they were unpermitted, that there were other billboards in the area which had not been investigated for valid permits, and that CSX had a lease with Viacom Outdoor for two billboards at that location, one of which was owned by Plaintiff. On December 2, 2003, an employee in the City's Economic Development and Property Management Department contacted CSX to find out whether CSX had leased its property to the owners of the billboards. At that time, the City employee informed CSX that the City did not have permits for either billboard in its records. The City employee also stated that one of the billboards was owned by Bryan Media and the other owner was unknown. In response, an employee for CSX stated "[y]es, we have a contract with Viacom Outdoor . . . for two (2) . . . signboards located north of 5th Ave. S, south of the RR track and east of 22nd Street."[3] (Dkt. 27-2 at 1) Although he could not recall the exact message delivered to him, in his deposition, Defendant Barton admitted that his employee relayed the information from the CSX inquiry to him prior to his directive to remove the subject billboards. (Barton Dep. 26:7-27:16) Further, Defendant Barton admitted that prior to construction of the sign monuments, he knew of at least one other billboard in the project area owned by a third party which he did not investigate. (Barton Dep. 31:16-34-1) The evidence also shows that the subject billboards were

3. Defendant Barton contends that he did not know based on this communication that Viacom Outdoor had a lease with Bryan Media.

removed without Plaintiff's knowledge or consent. (Barton Dep. 76:2-77:16)

However, Plaintiff has failed to produce any evidence for which it could be proven that the City's removal of the subject billboards was "constitutionally invidious." *Rindley,* 890 F. Supp. at 1551. As noted above, for Plaintiff to establish invidiousness, the City's actions must have been "motivated by constitutionally impermissible motives such as racial or religious discrimination or interference with the legitimate exercise of constitutional rights." *Fillingim,* 835 F.2d at 1399. Here, there is no invidiousness. The only evidence produced regarding Defendant Barton's motivation behind removing the subject billboards are the statements by Defendants that the billboards were moved to erect a sign monument at the entrance of the Pilot Project. Plaintiff does not provide evidence to negate Defendants' assertion. Plaintiff merely states in its memorandum in opposition to summary judgment that the reasons asserted by Defendants for the removal are "ostensible." (Dkt. 27-1 at 9) Thus, Plaintiff has not produced evidence to demonstrate Defendant Barton's or the City's actions were motivated by some constitutionally impermissible motive.

Further, Plaintiff has failed to assert and failed to produce evidence to establish the existence of a constitutionally protected right which it was legitimately exercising prior to removal of the subject billboards. Thus, Plaintiff has failed to show how its constitutional right was violated and how the removal of the subject

billboards interfered with the exercise of Plaintiff's constitutional right.

Due Process

Plaintiff contends the removal of the subject billboards deprived Plaintiff of its right to due process as Plaintiff was not afforded notice of the removal or an opportunity to be heard by the CEB prior to the removal. A federal due process violation requires "(1) a demonstration of a liberty or property interest interfered with by defendant and (2) a demonstration that defendant failed to use 'constitutionally sufficient procedures' in interfering with said liberty or property interest." *Neumont v. Monroe County*, No. 9910054CIVPAINE, 2003 WL 22466212, *2 (S.D. Fla. Sept. 3, 2003) (quoting *First Assembly of God v. Collier County*, 20 F.3d 419, 422 (11th Cir. 1994)). Two types of due process exist: substantive and procedural. *See McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir.1994). A violation of either is cognizable under 42 U.S.C. § 1983. *Id.*

Substantive due process protects "a general right of an individual to be free from the abuse of governmental power. . . ." *Rymer v. Douglas County*, 764 F.2d 796, 802 n. 4 (11th Cir. 1985). Such rights are protected against "'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Consequently, substantive due

process protections are afforded only to fundamental rights and liberties — those arising under the United States Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *Aremendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1996) (stating that the "use of substantive due process to extend to economic and property rights has been largely discredited." Such protection extends to government interference with "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, as well as with an individual's bodily integrity.").

The entitlement to procedural due process, on the other hand, arises from "the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). Procedural due process does not protect against the deprivation of rights; it only protects against an unfair process when depriving an individual of those rights. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The state has the opportunity to cure a procedural deprivation by "providing a later procedural remedy; only when the state refuses to provide [that remedy] does a constitutional violation actionable under section 1983 arise." *McKinney v. Pate*, 20 F.3d at 1557. Courts in this circuit have held that the lack of a "post-deprivation remedy" must be alleged in the complaint in order for a plaintiff's claims to survive dismissal on a procedural due process claim. *Neumont*, 2003 WL 22466212 at *2 (citing *Al Coletta v. City of North Bay Village*, 962 F. Supp. 1486, 1489 (S.D. Fla. 1997)).

Appendix B

As an initial matter, it should be noted that Plaintiff has failed to articulate whether it claims its substantive or procedural due process rights were violated. However, the evidence in this case does not support an assertion by Plaintiff that its right to substantive due process was violated as Plaintiff has not alleged governmental interference with "'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,' as well as with an individual's bodily integrity" or with some other fundamental constitutional right. *Aremendariz*, 75 F.3d at 1319.

With respect to Plaintiff's procedural due process claim, Plaintiff contends it was not afforded notice and a hearing prior to the removal of the subject billboards. As stated above, Plaintiff must first demonstrate that it had a liberty or property interest with which defendant interfered. *Neumont*, 2003 WL 22466212 at *2 Although the Fourteenth Amendment due process clause protects against deprivations of property without due process, it does not itself create a property interest. *See Richardson v. Town of Eastover*, 922 F.2d 1152, 1156 (4th Cir. 1991). A property interest, or entitlement, is grounded in state law and must be articulated by the party asserting such an interest. *Logan v. Zimmerman*, 455 U.S. 422, 428 (1982); *Bender v. City of St. Ann*, 816 F. Supp. 1372, 1376 (E.D. Mo. 1993). Here, Plaintiff has failed to articulate such an interest.

The evidence does not show and Plaintiff does not contend that Defendant Barton and the City deprived

Plaintiff of the subject billboards, only its unarticulated right, presumably, to display the unpermitted billboards. A final determination on whether Plaintiff's billboards were lawfully erected is a determination for the CEB. Whether the CEB has made its final determination and what that determination is has not been filed with this Court. The evidence of record related to Plaintiff's permitted status includes a redacted version of Exhibit 2.1(c) of the Asset Purchase Agreement which lists all local and state permits Plaintiff believes it acquired when it purchased Tampa Bay Juniors Posters, Inc. and Juniors Posters, Inc. in February of 2003. (Dkt. 25-4 at 104) However, a permit is not listed for the subject billboards.[4] Additionally, Plaintiff has failed to provide the Court with a copy of any permit for the subject billboards or other evidence to prove that Plaintiff held a valid permit for the subject billboards at the time of their removal. The only evidence before the Court is a conclusory assertion by Plaintiff that the subject billboards were permitted and lawfully erected at the time of their removal. These conclusory statements are insufficient to avoid summary judgment. *See Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (stating that the party opposing summary judgment must produce definite competent evidence to create a genuine issue of material fact). Thus, Plaintiff has failed to establish a property interest under Florida law for a claimed right to erect unlawful billboards. *Dep't of Transp. v. Durden*, 471 So. 2d 1271, 1272 (Fla. 1985) (holding there is no property interest involved "when

4. The subject billboards have a lease number of 1054.

the government seeks to remove an unlawful outdoor advertising sign erected in disregard of the established scheme of securing permits for such structures.").

However, assuming Plaintiff had established a protected interest in displaying the subject billboards in the CSX RR R/W, the City's subsequent notice to Plaintiff post-removal vitiates Plaintiff's claim that it did not receive adequate notice of the permitting violations connected to the subject billboards. *See McKinney v. Pate*, 20 F.3d at 1557 (stating that a state may cure a procedural deprivation by "providing a later procedural remedy; only when the state refuses to provide [that remedy] does a constitutional violation actionable under section 1983 arise."). The evidence shows that following Defendant Barton's windshield survey, the permitting department began an investigation and found there were a total of eight billboards in the DIPP area that were unpermitted. The codes compliance department sent notices to each violator. Plaintiff received six notices, a hearing was held before the CEB and Plaintiff sought judicial review of the decision of the CEB in the Sixth Judicial Circuit for the State of Florida. Thus, sufficient process was provided to Plaintiff post-removal of the subject billboards.

Retaliation

Regarding the post-removal violation notices sent by the City, Plaintiff maintains that the August 2004 violation notices were sent "in retaliation" for Plaintiff

"exercising its rights to due process and just compensation." (Dkt. 22-1 ¶ 46) Specifically, Plaintiff contends it received the violation notices in retaliation to its June 2004 letter where Plaintiff requested reimbursement of the cost incurred to re-erect the billboard and compensation for lost revenue. (Dkt. 22-13) The right to be free of retaliation "is clearly established as a *first amendment* right." *Ratliff v. DeKalb County, Ga.*, 62 F.3d 338, 340 (11th Cir. 1995). To state a claim for retaliation under Section 1983, a plaintiff must show that (1) the challenged actions constituted constitutionally protected activity, (2) the defendant's conduct adversely affected the plaintiff's exercise of that activity and (3) there is a causal connection between the defendant's retaliatory actions and the adverse action to the plaintiff. *Bennet v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

Here, the only evidence of record on this point shows that the City's investigation of the permit status of Plaintiff's other billboards began prior to Plaintiff's June 30, 2004 letter. During or before April 2004, Defendant Barton conducted his windshield survey delineating all billboards in the DIPP area. The results of this survey were passed on to the City's permitting department in April 2004. The permitting department sought to determine "whether permits had been issued for the billboards at those sites." (Ruggerio Aff. ¶ 5, Feb. 18, 2005) On July 7, 2004, Ms. Ruggiero and Defendant Bush visited the DIPP area. (Ruggerio Aff. ¶ 6, Feb. 18, 2005) The purpose of the visit was to "verify the existence and location of billboards at the sites that had

been brought to the [permitting department's] attention." (Ruggerio Aff. ¶ 6, Feb. 18, 2005) This investigation resulted in the City locating seven additional billboard locations which were not permitted or were incorrectly permitted. Five of those locations were billboards owned by Plaintiff and two other locations were owned by third parties.

On July 14, 2004, the City's manager of Property Management and Realty Services sent an internal memorandum to the City's risk management department with a copy of Plaintiff's June 2004 letter stating that it was suggested by the City's legal department that Plaintiff's letter be sent to risk management "for investigation and response." (Dkt. 27-2 at 3) While the July 14, 2004, memorandum may constitute circumstantial evidence that the City heightened its investigation of Plaintiff's property, it does not prove that Plaintiff was targeted. As noted above, at least two other billboard owners in the DIPP area received notices of violations in that area. As the investigation regarding the other billboard locations began in April 2004, and other billboards received similar violations in August 2004, no reasonable inference could be drawn nor is there record proof to suggest that the City "targeted Bryan Media's other [billboard] locations" in response to the letter sent by Plaintiff in June 2004. Thus, summary judgment as to **Count I** for the City is **GRANTED.**

Appendix B

Qualified Immunity

Defendant Barton separately asserts that he is entitled to qualified immunity for his involvement in the removal of Plaintiff's billboards. Qualified immunity protects government officials performing discretionary functions "from liability for civil damages [in their individual capacities] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The government official must show that he acted within the scope of discretionary authority when performing the challenged conduct. *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1263 (11th Cir. 2004). Discretionary conduct is that which occurs in the performance of official duties and "through means that were within [the official's] power to utilize," even if those means may be unconstitutional. *Id.* at 1265-66; *See Hill v. Dekalb Reg'l Youth Det. Ctr.,* 40 F.3d 1176, 1185 n.17 (11th Cir. 1994). If the government official meets this burden, then the plaintiff must show "(1) that the defendant has committed a constitutional violation and (2) that the constitutional right the defendant violated was 'clearly established' at the time he did it." *Saucier v. Katz,* 533 U.S. 194, 201 (2001); *Calvert v. Fulton County,* 152 Fed. Appx. 820, 822 (11th Cir. 2005); *Holloman,* 370 F.3d at 1264. Qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law." *Malley v. Biggs,* 475 U.S. 335, 341 (1986).

As stated above, viewed in the light most favorable to Plaintiff, the record evidence establishes conclusively that Defendant Barton's actions were discretionary. Defendant Barton's duties included management of the DIPP and its Pilot Project. (Barton Dep. 12:21-13:2) He also had "authority to carry out and administer policies of the City and to make discretionary decisions consistent with City policies." (Musset Aff. ¶ 9) As the City had a policy which allowed for the demolition of "non-conforming structures where demolition is necessary and appropriate," Defendant Barton acted within his discretionary authority when he ordered removal of the subject billboards. (Dkt. 33-5 at 3) Therefore, the burden shifts to Plaintiff to prove Defendant Barton committed a constitutional violation. As stated above, Plaintiff has not produced evidence to show that Defendant Barton violated any constitutional right to display its unpermitted billboards in the CSX RR R/W. Thus, summary judgment as to **Count II** for Defendant Barton is **GRANTED.**

2. Count III brought pursuant to Florida's Constitution

In Count III, Plaintiff contends the City and Defendant Barton removed Plaintiff's billboards to the exclusion of others similarly situated. When bringing a cause of action for selective enforcement as a denial of equal protection pursuant to Florida's Constitution, the selective enforcement must be deliberately based on an unjustifiable or arbitrary classification. *Bell v. State of Florida, et al.*, 369 So. 2d 932, 934 (Fla. 1979); *Meristem*

Valley Nursery, Inc. v. Metro. Dade County, 428 So. 2d 726, 728 (Fla. 3d DCA 1983). "Mere failure to prosecute all offenders is no ground for a claim of denial of equal protection." *Bell*, 369 So. 2d at 934. As noted above, Plaintiff asserts a claim of selective enforcement based primarily upon the City and Defendant Barton's failure to remove other unpermitted billboards located within the DIPP and Pilot Project areas. While the evidence shows Defendant Barton only removed Plaintiff's billboards, i.e., failed to prosecute all offenders, this alone is insufficient as a matter of law to sustain a claim for denial of equal protection under Florida's Constitution. *Id.* Further, the evidence shows that subsequent to the removal, the City began code enforcement action against other billboard locations.

Further, Plaintiff has failed to produce evidence to prove the City's actions were "deliberately based on an unjustifiable or arbitrary classification" or, if there was such a classification, what that classification was. *Id.* To the extent Plaintiff is claiming the City and Defendant Barton sent subsequent violation notices as "punishment for or in retaliation to" Plaintiff's attempt to exercise its rights to due process, that assertion fails as it is contrary to the only evidence proffered on the point. (Dkt. 22-1 ¶ 59) The uncontroverted evidence shows that following Defendant Barton's windshield survey, the permitting department investigated other billboards in the area and found there were eight billboards in the DIPP area that were unpermitted, six of which belonged to Plaintiff and two of which were owned by third parties. Each billboard owner received

notices of their respective violations. The record shows that at least eight violators within DIPP area received citations based strictly on their unpermitted status, nothing more. Accordingly, summary judgment as to **Count III** for the City and Defendant Barton is **GRANTED.**

B. Count IV, Tortious Interference with Business Relationships against the City and Defendant Barton.

In Count IV, Plaintiff contends the City and Defendant Barton intentionally and unjustifiably interfered with Plaintiff's relationship with Viacom Outdoor and "other businesses" by removing the subject billboards. The City and Defendant Barton challenge this claim on the ground that any interference with Plaintiff's business relationships was only negligent or consequential. Defendant Barton further asserts sovereign immunity and contends Plaintiff's own failure to obtain the proper permits interfered with its business relationships.

The elements of a cause of action for tortious interference with a business relationship are: (1) the existence of a business relationship under which the plaintiff has legal rights; (2) knowledge of the relationship by the defendant; (3) an intentional and unjustified interference with that relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the business relationship. *Toledo v. Hillsborough County Hosp. Auth.*, 841 So. 2d 482, 483

(Fla. 2d DCA 2003). The plaintiff must prove that the defendant's interference was maliciously motivated. *Rockledge Mall Assocs., Ltd. v. Custom Fences of South Brevard, Inc.*, 779 So. 2d 554, 557 (Fla. 5th DCA 2001) (stating that "the existence of malice is key to the tort of tortious interference with a business relationship."). As a general rule, "an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 815 (Fla. 1994).

At the onset, it should be noted that Plaintiff only presents the Court with evidence of a business relationship with Viacom Outdoor. It does not identify any "other businesses" or business relationships impacted by the City and Defendant Barton's alleged tortious interference. With respect to the Viacom Outdoor relationship, the evidence of record shows that Plaintiff had a business relationship with Viacom Outdoor, the agent servicing the lease contracts. (Dkt. 2-4 at 11) The evidence also supports the existence of this business relationship at the time the subject billboards were removed. (Dkts. 27-2 at 1, 2-4 at 11) Further, the City, through its employee, became aware of the business relationship between Plaintiff, Viacom Outdoor and CSX on or about December 2, 2003, when an employee in Defendant Barton's department e-mailed CSX to find out whether CSX had a lease or license for the subject billboards, at least one of which was "owned

by Bryan Media." (Dkt. 27-2 at 1) The representative from CSX answered saying "[y]es, we have a contract with Viacom Outdoor . . . for two (2) . . . signboards located north of 5th Ave. S, south of the RR track and east of 22nd Street." (Dkt. 27-2 at 1) Defendant Barton admits the employee in his department relayed this information to him prior to his directive to remove the subject billboards. Thus, Plaintiff has established the first and second elements.

Regarding the third and fourth elements, as evidenced by the letter Plaintiff received from Viacom Outdoor warning Plaintiff about the possible cancellation of the license agreement, Plaintiff's business relationship with Viacom Outdoor was presumably damaged. However, the evidence does not show that Defendant Barton's actions were malicious. Defendant Barton's knowledge of the existence of the business relationship and the fact that he intended to have the subject billboards removed are insufficient to establish any malicious intent to interfere with Plaintiff's relationship. *See Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Fla.*, 832 So. 2d 810, 814 (Fla. 2d DCA 2002) (stating that a defendant's knowledge of the existing business relationship is insufficient to create liability for tortious interference unless there is some evidence that the defendant intended to interfere with the relationship); *S. Bell Tel. & Tel. Co. v. Roper*, 482 So. 2d 538, 539 (Fla. 3d DCA 1986) (stating that "the only way malice can be proved in the absence of direct evidence is by proving a series of acts, which, in their context or in light of the totality of surrounding

circumstances, are inconsistent with the premise of a reasonable man pursuing a lawful objective, but rather indicate a plan or course of conduct motivated by spite, ill-will, or other bad motive."). No other evidence regarding Defendant Barton and the City's intent has been presented to this Court.

Therefore, Plaintiff has failed to establish any basis for a tortious interference claim against the City and Defendant Barton.

Statutory Immunity

Defendant Barton also argues he is statutorily immune from liability in his official capacity under Count IV by virtue of Fla. Stat. § 768.28(9)(a), which provides:

> [n]o officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, *unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.*

(emphasis added)

While employed by the City, Defendant Barton possessed "authority to carry out and administer policies of the City and to make discretionary decisions consistent with City policies." (Musset Aff. ¶ 9) As stated above, Defendant Barton acted within the scope of his employment when he ordered removal of the subject billboards. Plaintiff has alleged Defendant Barton "intentionally and unjustifiably interfered" with Plaintiff's business relationship with Viacom Outdoor. (Dkt. 22-1) To wit, Plaintiff asserts Defendant Barton acted with "wanton and willful disregard" of Plaintiff's business relationship by ordering removal of the subject billboards. As stated above, Defendant Barton's malicious intent has not been proven by the evidence. As such, the Court finds that Defendant Barton in his official capacity is statutorily immune from liability under Count IV. Accordingly, summary judgment as to **Count IV** for the City and Defendant Barton is **GRANTED.**

C. Count V, Equitable Estoppel against all Defendants.

In Count V, Plaintiff asserts that Defendants are estopped from enforcing the permitting codes against it because its billboards have been in the City for over forty years with the City's knowledge. To state a claim for equitable estoppel, the plaintiff must establish: (1) a representation as to a material fact by the defendant that is contrary to a later asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the plaintiff, caused by the defendant's representation and the plaintiff's reliance

thereon. *Council Bros., Inc. v. City of Tallahassee*, 634 So. 2d 264, 266 (Fla. 1st DCA 1994).

Equitable estoppel will apply against a governmental entity only in rare instances and under exceptional circumstances. *North Am. Co. v. Green*, 120 So. 2d 603, 610 (Fla. 1960); *Council Bros., Inc.*, 634 So. 2d at 266. The "exceptional" circumstances necessary to invoke estoppel against a governmental agency consist of (1) conduct by the government that goes beyond mere negligence and that will cause serious injustice and (2) a showing that the application of estoppel will not unduly harm the public interest. *Id.* Equitable estoppel is also only available as a claim against government agencies in cases in which the government has either made affirmative representations of fact or knowingly acquiesced in the plaintiff's conduct. *Associated Indus. Ins. Co. v. Dep't of Labor and Employment Sec.*, 923 So. 2d 1252, 1255 (Fla. 1st DCA 2006). Misstatements of fact by a government employee can serve as the basis for a finding that the government agency is equitably estopped from acting. *Tri-State Sys., Inc. v. Dep't of Transp.*, 500 So. 2d 212, 216 (Fla. 1st DCA 1986) (finding that misrepresentations of fact by a DOT employee to an advertising sign owner regarding whether the signs could be placed within 1000 feet of each other could serve as a basis for finding that the DOT was estopped to assert the invalidity of the signs). Courts have consistently recognized that misstatements of law by government employees cannot support a claim of equitable estoppel. *See Council Bros., Inc.*, 634 So. 2d at 266 (citing *State Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981)).

Appendix B

Even when viewed in the light favorable to Plaintiff, the set of facts in this case cannot satisfy the extraordinary circumstances standard necessary to invoke equitable estoppel against a government entity. Here, Plaintiff attempts to establish such "exceptional circumstances" based upon a single five to ten minute hurried, non-specific, undocumented, unrecorded[5] telephone conversation between Plaintiff's principal, Mr. Kenneth Bryan, and the City's sign examiner, Ms. Renee Ruggiero. The sum and substance of the conversation as recalled by Mr. Bryan is as follows: He explained that he was about to spend "a lot of money" on a billboard lease agreement and she informed him that if the billboards were already up they were "okay" but that he could not erect any new billboards.[6] On this basis and on the contention that the City acquiesced in the continued unpermitted display of the billboards, first in the hands of Plaintiff's predecessor and then in Plaintiff's hands, Plaintiff asserts its equitable estoppel claim.

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5. The fact that the statement is not recorded or documented is not dispositive of this issue. It is pointed out only to place the content of the employee's statement in context. Had the statement been a clear statement of fact, even if it were undocumented, case law suggests it could subject the municipality to an equitable estoppel claim. *Council Bros., Inc.*, 634 So. 2d at 266.

6. Ms. Ruggiero, of course, denies she made any such statement to Mr. Bryan, but the Court accepts Plaintiff's allegations in this regard as true for purposes of reviewing this Motion.

Appendix B

Looking to the case law for guidance, the Court finds that the types of circumstances that have been found sufficient to bind a governmental entity to a misstatement of *fact* under an equitable estoppel theory have all involved an employee's conveying of some definitive answer to a specific question regarding the relevant state of affairs and are fully distinguishable from the facts adduced on this record. For example, the following have been found to constitute misstatements of fact sufficient to invoke equitable estoppel against the government: 1) factual confirmation by employee that application was approved based upon misunderstanding that billboards were permitted to be placed 1000 feet apart when the applicable regulation required that they be spaced 1500 feet apart, *Dolphin Outdoor Adver. v. State Dep't of Transp.*, 582 So. 2d 709 (Fla. 1st DCA 1991); 2) advice that prior private school employment could be "purchased" and credited to enhance retirement benefits when the regulation provided that only prior public school employment could be credited toward retirement, *Salz v. Dep't of Admin., Div. of Ret.*, 432 So. 2d 1376 (Fla 3d DCA 1983); and 3) advice that a construction project placed for bid would be not be subject certain charges because of the nature of its function when, in fact, the project was not exempt from the charges, *Council Bros., Inc.*, 643 So. 2d at 264.

By comparison, the following are exemplars of cases involving misstatements of *law*, which cannot bind a governmental entity under equitable estoppel: 1) statements by Department of Labor employees that certain deductions that were being calculated and taken

by worker's compensation insurance carriers were appropriate when the deductions were later conclusively determined not to be appropriate, *Associated Indus. Ins. Co.*, 923 So. 2d at 1258; 2) admitted assurances by Department of Revenue examiner that a late registration and tender of a yacht resale certificate would not prevent the transaction from being entitled to tax exempt status where the rules required the timely certification of the transaction in order to qualify for the exemption, *Anderson,* 403 So. 2d at 397; and, 3) assurances by state employees that a contractor from a different state was legally authorized to submit a bid on a state project when he was not, *Greenhut Const. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517 (Fla. 1st DCA 1971).

Compared to these two categories of cases, the asserted response, "You're okay," as disclosed in the deposition of Mr. Bryan and relied on by the Plaintiff in this case, is no advice at all. It is not a confirmation or representation of fact, and it is not a representation as to Plaintiff's legal rights and obligations. A blanket assertion that "you're okay," unassociated with a specific factual or legal inquiry is insufficient as a matter of law to establish the predicate "rare instance or exceptional circumstances" needed to invoke the doctrine of equitable estoppel against a governmental entity. Assuming *arguendo* that somehow Ms. Ruggiero's statement, "You're okay," could be extrapolated to mean, as Plaintiff argues here, that the signs conformed to all ordinances, the statement could only be characterized as a misstatement of law, which

cannot bind the municipality. *See Anderson,* 403 So. 2d at 400.

Finally, the relief Plaintiff seeks on the basis of Ms. Ruggiero's response or, alternatively, due to the City's acquiescence in allowing the signs to stand without a permit, points up the fallacy of the claimed estoppel asserted in this case. Apparently, Plaintiff now contends that even if the offending signs are illegal, because of Ms. Ruggiero's causal response, the City is forever equitably estopped from raising the issue of the illegality of the signs and, presumably, should be required to issue permits for the signs or permit them to stand unpermitted in perpetuity or pay Plaintiff for the loss of revenues and costs incurred under its contract. No such claim lies on the facts as alleged and established on this record. On the facts of this case, if any party could assert such a claim it might have been Plaintiff's predecessor in ownership if the City had sought to assert fines for the violations dating back to their initial erection. Plaintiff, however, only claims to have owned the billboard rights for several months before enforcement actions began. Plaintiff does not allege that the City sought retroactively to impose fines prior for periods predating the enforcement. In this regard, even the cases that recognize acquiescence of a government entity as a basis to invoke equitable estoppel only preclude the government from seeking retroactive enforcement of rules, laws or regulations which it has overlooked or failed to enforce in the past. The effect of equitable estoppel is not to preclude the government from future efforts, such as the ones

undertaken here, to enforce its lawful ordinances. Accordingly, summary judgment as to **Count V** for the City is **GRANTED.**

As Plaintiff fails to assert any actions or omissions attributable to Defendants Barton, Guynn and Bush in Count V, in their individual or official capacities, summary judgment as to **Count V** for Defendants Barton, Guynn and Bush is **GRANTED.**

D. Count VI, Unconstitutional Takings against the City and Defendant Barton

In Count VI, Plaintiff contends the City's "retaliatory targeting" of Plaintiff's billboards and Defendant Barton's removal of the subject billboards constitute the taking of Plaintiff's property without just compensation. The Takings Clause of the Fifth Amendment states that private property shall not be taken by the government for public use without just compensation. Property is "taken" when the government substitutes its ownership for the previous owner or when the property is damaged, destroyed or depreciates in value because of governmental interference. *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945). It applies whenever government action renders property worthless or denies the owner "all economically beneficial and productive use" of the property. *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1014-16 (1992); *Jackson v. City of Stone Mountain,* 232 F. Supp. 2d 1337, 1366 (N.D. Ga. 2002). Similarly, Article X, Section 6(a) of Florida's Constitution states that no

private property shall be taken except for a public purpose and with full compensation therefore paid to each owner. Compensation to the owner of the property is required when the government commits an "entirely negative act" which substantially deprives the owner of all beneficial enjoyment in his property. *Kirkpatrick v. City of Jacksonville through Dep't of Hous. and Urban Dev.*, 312 So. 2d 487, 490 (Fla. 1st DCA 1975). Plainly then, the *sine qua non* of a "takings" claim is demonstrated ownership of property which ownership has been negated to some degree by some government action.

Plaintiff contends that the violation notices sent by the City constitute a taking of Plaintiff's property. Such leasehold interests, if established, may constitute sufficient property interests to establish a takings claim. *See Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003). As conclusively established, however, the evidence of record shows the City did not have records of permits for Plaintiff's billboards. As such, violation notices were sent to Plaintiff in August 2004. In February 2005, in her affidavit, Ms. Ruggiero stated that these billboard locations did not have permits in the City's records and further, they could not obtain permits under the city code. Specifically, Ms. Ruggiero stated:

> Section 16-710(1)f.3 of the [c]ity [c]ode permits billboards in general commercial or industrial land use classifications which are abutting interstate and federal-aid-primary designated roads, subject to other requirements such as

> height and area of the sign faces. . . . At all eight of the sights [including the site of the subject billboards], . . . a permit for a billboard would be precluded by Section 16.710(1)f.3 of the [c]ity [c]ode because not one of these eight sites abuts an interstate or federal-aid-primary designated road.

(Ruggiero Aff. ¶ 10,11, Feb. 18, 2005)

The redacted version of Exhibit 2.1(c) of Plaintiff's February 2003 Asset Purchase Agreement shows Plaintiff's predecessors had acquired local and state permits to "lawfully operate" at five out of the six locations which were cited as violating the city code in August 2004.[7] (Dkt. 22-8 at 12-13) As noted above, a permit was not listed for the subject billboards.[8] In November 2004, the City's CEB provided Plaintiff an opportunity to cure its violation by producing the permits for its billboards. The Sixth Judicial Circuit of the State of Florida also provided Plaintiff with this opportunity when it quashed and remanded the decision of the CEB. Plaintiff, however, has failed to provide this Court with copies of the permits it claims to have acquired in February 2003 or any subsequent permits it acquired from the City. Without copies of the permits to show that Plaintiff's billboards were lawfully erected at the time the violation notices were sent by the City,

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7. These billboards have lease numbers of 1052 and 1053.

8. The subject billboards have a lease number of 1054.

the only evidence before the Court is that the subject billboards were unlawful. Thus, Plaintiff has demonstrated no property interest in its billboards to establish a takings claim. *See Durden*, 471 So. 2d at 1272. Accordingly, summary judgment as to **Count VI** is **GRANTED.**

E. Count VII, Injunctive Relief against all Defendants

In Count VII, Plaintiff requests injunctive relief to enjoin the City from enforcing the city codes against Plaintiff because Plaintiff contends it is likely to succeed on its claims of selective enforcement, equitable estoppel and tortious interference with business relationships. As Plaintiff's claims for selective enforcement, equitable estoppel and tortious interference with business relationships against the City and Defendant Barton and its claim for equitable estoppel as to Defendants Guynn and Bush have been summarily dismissed, Plaintiff's request for injunctive relief is **DENIED.**

IV. Conclusion:

For the reasons set forth above, the City's Motion (Dkt. 23) is **GRANTED** as to all counts; Defendants Guynn and Bush's Motion (Dkt. 24) is **GRANTED** as to all counts ; and, Defendant Barton's Motion (Dkt. 28) is **GRANTED** as to all counts.

Appendix B

DONE and **ORDERED** this 11th day of December 2006.

s/ Mary S. Scriven
MARY S. SCRIVEN
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 20, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-10189-AA

BRYAN MEDIA, INC., a Florida corporation,

Plaintiff-Appellant,

versus

CITY OF ST. PETERSBURG,
a municipal corporation, RON BARTON,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BEFORE: ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON
UNITED STATES CIRCUIT JUDGE

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(2)

No. 08-920

Supreme Court, U.S.
FILED
FEB 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRYAN MEDIA, INC.,

Petitioner,

v.

CITY OF ST. PETERSBURG, FLORIDA, *ET AL.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The facts of this case occurred in two distinct phases. The first phase began when a contractor for the City of St. Petersburg, employed to erect a large concrete monument marking the site of an industrial project on city-owned land, took down a pair of outdoor advertising signs belonging to the Petitioner, Bryan Media (herein, "Bryan"). The signs stood on railroad right of way adjoining the city property. The contractor took the signs down because they blocked the access that he needed to install the monument on the city property . (Pet. Apx. B at 7a, 8a, 19a)

The contractor acted upon the authorization of a city employee, Ron Barton, who authorized the contractor to take the signs down when the contractor arrived at the job site. Mr. Barton had earlier determined that no record of any permit for the signs could be found in city records. (Pet. Apx. B at 8a) The signs were damaged by the contractor. Bryan, not the City or its contractor, removed the signs from the site and placed them in storage. (Pet. Apx. B at 8a, 9a)

After Bryan's signs were taken down, Mr. Barton noticed other outdoor advertising signs he did not recall seeing before. He conducted a "windshield survey" and noted the sign locations on a map. During or before April of 2004, Mr. Barton sent his findings to the City's permitting department to determine whether permits had been issued for them. (Pet. Apx. B at 9a, 25a) The record shows no further involvement by Mr. Barton after his findings were turned over to the permitting department.

The second phase of this case began in June of 2004, approximately six months after the signs were taken down, when Bryan re-erected outdoor advertising signs on the same site. (Pet. Apx. B at 9a)

On August 4, 2004, the City sent notices of violation to the railroad company and to Bryan, and to the owners of seven other sites where outdoor advertising signs were found without a permit. (Pet. Apx. B at 9a, 10a) Bryan's signs appeared on six of the eight sites including the railroad property where Bryan had re-erected the signs. (Pet. Apx. B at 10a, 24a, 26a) The notice to the railroad company prompted a letter to Bryan advising that its license agreement was subject to cancellation in the absence of proof of the requisite permits. (Pet. Apx. B at 10a, 32a)

On November 18, 2004, the city's code enforcement board conducted a hearing on the violation notices sent to the railroad company and to Bryan. The board ruled that the signs were unlawful. The board gave Bryan until December 17, 2004, to submit its permit or remove the signs. (Pet. Apx. B at 10a)

Bryan sought judicial review of the board's order in the Circuit Court of the Sixth Judicial Circuit of Florida. As the District Court noted, the board's decision was quashed by the state court because the board failed to abide by its oral decision giving Bryan thirty days in which to locate a permit for the signs. The case was remanded back to the board. (Pet. Apx. B at 12a, 42a) The District Court noted that a final determination on whether the signs were lawfully erected is a determination for the city's code enforcement board.

The Court also noted that the board's final determination had not been filed with the District Court when the Court granted the motions of the City, Mr. Barton, and other city employees on all counts. (Pet. Apx. B at 23a)

This Court should be aware of subsequent developments in the state court after the board's order was quashed. The case was not taken back to the board. In 2007, after the City acquired the railroad property for use as a bicycle trail, Bryan's signs were still in place. The City initiated a new code enforcement case against Bryan which the code enforcement board heard on November 28, 2007. The board again determined that the signs were in violation of the city code, as being maintained without a permit. Bryan again sought judicial review of the board's decision. The state court affirmed the decision after finding that competent substantial evidence supported the board's findings and that the essential requirements of law were "not only observed but exhausted." *Bryan Media v. City of St. Petersburg*, Appeal No. 07-000073-AP-88B (Fla. 6th Cir., Dec. 3, 2008), Order and Opinion, at 3. A copy of the Order and Opinion is attached hereto as Exhibit A. That order is not final, but is pending on a petition for writ of certiorari to the Second District Court of Appeal of Florida, *Bryan Media v. City of St. Petersburg, petition for cert. filed*, Case No. 2D08-6413 (Fla. 2d DCA, Dec. 31, 2008).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a relevant decision of this Court or any decision of any Court of Appeals or a state court of last resort, and does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10.

I. The decision does not conflict with relevant decisions of this Court with respect to protected property interests under the procedural category of the Due Process Clause

Bryan initially argues that the decision of the Eleventh Circuit Court of Appeals conflicts with the "landscape of protected property interests under the procedural category of the Due Process Clause." More specifically, Bryan argues that, when the contractor took down the signs to gain access to the City's property, Bryan was deprived of what it calls a state-created "notice and hearing benefit," or a benefit derived from the right to receive notice and hearing in any case taken to a code enforcement board. Bryan characterizes this "benefit" as a protected property interest. The argument is fanciful. There is no legal authority for it.

Bryan's "notice and hearing benefit as a property right" argument is made here for the very first time during the course of this lawsuit.

Bryan's argument disregards the facts of this case, which show that the taking down of the signs by the

City's contractor predated commencement of code enforcement proceedings by approximately six months. Although Mr. Barton had found no evidence that a permit had been issued for the signs, the signs remained in place until the contractor arrived on the job site. The signs were taken down simply because they were in the contractor's way. When Mr. Barton conducted his survey of signs in the neighborhood, the Bryan signs had not been replaced. After Bryan replaced the signs, the City commenced a code enforcement proceeding by sending out violation notices.

Bryan does not complain that the board heard the case without proper notice and without giving him a right to be heard. Instead, Bryan confuses the taking down of the signs by the contractor with a code enforcement proceeding and argues that the procedures required for taking a case to the board applied months earlier, when the contractor took the signs down.

In effect, Bryan argues that a requirement to give notice and conduct a hearing before a board is a "procedural due process benefit" equating to a protected property interest which, if not followed, is a "taking" without notice and hearing. According to that argument, not giving such a notice and hearing would require a notice and hearing.

In support of this unprecedented theory, Bryan cites Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2002), in which Professor Thomas W. Merrill surveyed decisions of this Court on governmental interference with property under the Due Process Clause (procedural and substantive) and the

Takings Clause and fashioned a method or strategy to reconcile the decisions on the threshold issue of what is "property."

Unfortunately, Bryan gleaned nothing from this article except the title.

Bryan argues a Procedural Due Process taking. Professor Merrill offers a definition of "property" for the purpose of the Procedural Due Process clause which he calls "property as entitlement," which requires asking whether nonconstitutional sources of law confer an entitlement on a claimant having a monetary value that can be terminated only upon a finding that a specific condition has been satisfied. *Id.*, at 893. Examples of "property as entitlement" would be utility services, *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978), and the right to maintain a cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Bryan's claim to a "procedural due process benefit" is not "property as entitlement." The right to notice and a hearing before a code enforcement board has no monetary value and cannot be terminated upon a showing of "cause." The right cannot be "terminated" at all. If a code enforcement board hears a case without notice to the violator and without affording the violator the opportunity to appear and be heard, the board's decision is void. This failure did not occur and Bryan does not argue that it did.

Professor Merrill offers two other definitions of "property" for the purpose of the Takings Clause and the Substantive Due Process Clause which he calls

"property as ownership" and "property as wealth," respectively. Merrill, *supra*, at 893-894, 960, 963. Bryan's claimed "procedural due process benefit" does not fit either definition.

Bryan cites various federal cases in which persons had property interests in benefits under government programs. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (public assistance under the Aid to Families with Dependent Children), and *Bell v. Burson*, 402 U.S. 535 (1971) (driver's licenses and registration), occurred during what Professor Merrill describes as a brief period during which this Court spoke as if procedural due process applied to any interest that is "important," whether or not such interest can be properly categorized as "property" (or "life" or "liberty"). According to Professor Merrill, this period lasted until *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which this Court said, "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*, at 577. *Roth* marked the beginning a line of decisions in which this Court has become increasingly insistent that persons seeking protection of economic interests under either the Due Process or Takings Clauses establish that they have "property" if they are to avoid dismissal of their lawsuits. Merrill, *supra*, at 887.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in which a civil service employee challenged his dismissal for dishonesty, this Court

examined the issue of whether Ohio's pretermination process must be accorded to the employee. The state argued that the employee's property right in continued employment was defined by, and conditioned upon, the state's choice of procedures, an argument which had come to be known as the "bitter with the sweet" argument. The majority of this Court rejected that argument and held that the Ohio statute was constitutionally deficient. This Court said, "The categories of substance and procedure are distinct. . . . 'Property'cannot be defined by the procedures provided for its deprivation." *Id.* at 541.

In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the plaintiff claimed a procedural due process deprivation of a "property interest" in police enforcement of a restraining order against her estranged husband, after her husband murdered their children despite her having called the police for help several times. This Court held that, for the purposes of the Due Process Clause, she did not have a property interest in police enforcement:

> Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. [citations omitted] *Id.*, at 756.
>
> * * * * *
>
> Even if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining

> order could constitute a "property" interest for purposes of the Due Process Clause. Such a right would not, of course, resemble any traditional conception of property. Although that alone does not disqualify it from due process protection, as *Roth* and its progeny show, the right to have a restraining order enforced does not "have some ascertainable monetary value,""as even our "*Roth*-type property-as-entitlement"cases have implicitly required. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 964 (2000) . . . *Id.*, at 766.

In his concurring opinion, Justice Souter added:

> . . . Gonzales claims a property interest in a state-mandated process in and of itself. This argument is at odds with the rule that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." [Citations omitted.] . . .
>
> * * * * *
>
> Thus, in every instance of property recognized by this Court as calling for federal procedural protection, the property has been distinguishable from the procedural obligations imposed on state officials to protect it. *Id.*, at 770-771.

* * * * *

> . . . To accede to Gonzales's argument would therefore work a sea change in the scope of federal due process, for she seeks federal process as a substitute simply for state process. . . . Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected. *Id.*, at 772.

In the instant case, giving notice and an opportunity to be heard by the code enforcement board was discretionary with city officials, who elected (consciously or otherwise) not to take a case against the signs before the board when they discovered the absence of sign permits. Later, when the signs were re-erected, city officials did decide to take the case to the board and they afforded Bryan with notice and the right to be heard by the board. As in *Castle Rock*, *supra*, Bryan claims a property interest in a process. This argument is at odds with the rule that process is not an end in itself, and that procedure to protect property is not property.

Other cases cited by Bryan do not support its argument. In each of these cases, the question before the Court was whether the Due Process Clause requires that the recipient be afforded the right to be heard

before the termination of benefits. The benefits ranged from disability benefits under the Social Security Act, *Mathews v. Eldridge*, 424 U.S. 319 (1976), to public education, *Goss v. Lopez*, 419 U.S. 565 (1975), to the right to maintain a cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In each case, this Court decided that deprivation of the benefit required some sort of notice and some sort of hearing, but in each case the property interest in a benefit existed apart from procedural protections.

At first glance, *Logan*, *supra*, might arguably support Bryan's contention. Mr. Logan was fired by the brush company for a physical defect which the company believed would interfere with his duties as a shipping clerk. He filed charges with the Illinois Fair Employment Practices Commission, which failed to convene a fact-finding conference within 120 days as required by state law. After the statutory period expired, the Illinois Supreme Court ruled that the Commission lacked jurisdiction to hear the case, thus extinguishing Logan's cause of action. This Court determined that Logan had a protected interest in the right to maintain a cause of action, a cause of action having earlier been found to be a species of property protected by the Fourteenth Amendment. *Logan*, *supra*, at 428, citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The right to use the Commission's adjudicatory procedures shared the characteristic of other property interests, which is an individual entitlement which cannot be removed except for cause. The state's 120-day limit was not a substantive element of the claim but a procedural limitation upon the ability of the claimant to assert his rights. *Logan*, *supra*, at 433. Turning to

the question of what process was due, this Court concluded that Logan was entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. *Logan, supra,* at 434.

The instant case is wholly unlike *Logan*. Here, the state-created requirement to give notice and conduct a hearing before a code enforcement board is the process which is due before the board may find someone to be in violation of the codes. A failure to give notice and afford a hearing before the board deprives no person of a right to maintain a cause of action except perhaps the City itself. The right to notice and a hearing is a benefit to the violator only in the sense that a failure to by the City to give notice or a hearing would be a defense, invalidating the board's action if the board should find a violation to exist.

In no case has this Court or any Florida court ever decided that the right to notice and hearing - a "notice and hearing benefit" - is itself a property interest. A "notice and hearing benefit" does not exist as a protected property right within the "landscape of protected property interests" under the procedural category of the Due Process Clause.

II. The decision does not conflict with a decision of any Court of Appeals or a state court of last resort

Bryan's second argument abandons the novel "notice and hearing benefit" theory for a wholly different definition of the property interest at stake. Bryan asserts that the City trespassed upon the railroad property and knocked down the billboards, destroying them or appropriating them to a public use, causing compensable damages. Bryan contends that the "order to remove the billboards" was a compensable taking under the Takings Clause of the Fifth Amendment. Bryan asks whether the City did not "take" the billboards when it "destroyed" them.

By "order to remove the billboards," Bryan presumably refers to the taking down of the signs by the city's contractor, after which the signs were removed by an employee of Bryan. There was no "order" to remove the signs until the code enforcement board, after notice and hearing, found that the signs violated the city code.

Bryan describes the taking down of the signs by the city's contractor as both a trespass onto railroad property and a destruction of Bryan's personal property. Regarding the alleged trespass, which is raised here for the very first time during the course of this lawsuit, the record does not show that the railroad company ever complained about a trespass and there is no evidence of damage to the railroad property. The record does not show that the trespass, if a trespass occurred, was continuing or permanent. Bryan had only a revocable

agreement, and in fact received notice that the agreement was subject to cancellation in the absence of proof of the requisite permits.

Regarding the claim for destruction of the billboards, the District Court noted that, "The evidence does not show and Plaintiff [Bryan] does not contend that Defendant Barton and the City deprived Plaintiff of the subject billboards, only its unarticulated right, presumably, to display the unpermitted billboards." Order, Appendix B, at 23a. The court concluded that Bryan failed to establish a property interest under Florida law for a claimed right to erect the unlawful billboard. Order, Appendix B, at 23a.

With respect to Count VI, the District Court also noted that, "Plaintiff contends that violation notices sent by the City constitute a taking of Plaintiff's [Bryan's] property." Order, Appendix B, at 41a. The court concluded that the only evidence before the court was that the signs were unlawful, and Bryan demonstrated no property interest in the signs to justify a takings claim. Order, Appendix B, at 43a.

Bryan now wishes to make it clear, as it never has before, that its Takings Clause claim is based upon destruction of personal property – i.e., the sign structures. This is a tort claim disguised as a Fifth Amendment takings claim.

Bryan misapprehends the differences between federal law and state law with respect to claims arising in tort.

The Takings Clause prohibits the taking of private property for public use without just compensation. U.S. CONST. amend. V.

Bryan's first obstacle is that the signs were not taken for public use.

Bryan's next, and fatal, obstacle is a lack of subject matter jurisdiction over this claim because the claim was not ripe. Specifically, before asserting a Takings Clause claim in federal court, Bryan was required to seek compensation through appropriate state channels. No constitutional violation occurs until compensation has been denied. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson County* 473 U.S. 172, 195 (1985). *Accord, Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir., 2007), in which a claim for trespassing and an unconstitutional taking was dismissed because the plaintiff had not exhausted his remedies in state court, where "exhaustion" was used as shorthand for the rule that no constitutional violation occurs until just compensation has been denied, and, therefore, resort to state procedures is necessary. *Peters, supra*, at 730 n. 4. *See, also, Watson Construction Co. v. City of Gainesville*, 244 Fed. Appx. 274, 2007 U.S. App. LEXIS 14298 (11th Cir., 2007) (federal takings claim was not ripe and, therefore, federal courts have no jurisdiction over it).

Florida law provides an adequate procedure for seeking just compensation under an inverse condemnation claim. *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994).

Bryan argues conflict with decisions of the Florida Supreme Court, specifically *Selden v. City of Jacksonville*, 10 So. 457 (Fla. 1891), *White v. Pinellas County*, 185 So.2d 468, 471 (Fla. 1966), and *State Road Dept. of Florida v. Tharp*, 1 So.2d 868, 870 (Fla. 1941). These decisions are not in conflict with the decision of the Eleventh Circuit. Two of these cases, *White* and *Tharp*, demonstrate that a state court remedy is available in inverse condemnation under Florida state law.

White, supra, was an action for damages following the removal by the county of vegetation growing on private property pursuant to a planned program of highway improvement. The Florida Supreme Court reversed summary judgment for the county and remanded with instructions for a trial by jury. The Florida Supreme Court's decision does not explain which Constitution the court was applying, but the intermediate appellate court referred specifically to the Florida Constitution. *White v. Pinellas County*, 174 So.2d 88, 90 (Fla. 2d DCA 1965).

In *State Road Dept. of Florida v. Tharp, supra*, the owner of a water mill sued a state agency following the erection of a bridge and fill which raised the elevation of the water in the mill race, reducing the capacity of the mill. The plaintiff alleged a taking for the benefit of the public without due process, and alleged that the taking constituted a continual trespass and an irreparable injury. The question before the Florida Supreme Court was whether the Florida Constitution made the state "nonsuable." The Court decided that the

state necessarily had to be suable in such a case in order to afford relief under the Florida Constitution's takings and property rights clauses.

Selden, *supra*, was an unsuccessful attempt by an owner of property adjoining a public street to enjoin a city from changing the grade of the street. The Florida Supreme Court held that consequential damages to property abutting a public street did not constitute a "taking" or an "appropriation" under the Florida Constitution. The relevancy of that decision to the instant case is not explained.

Bryan also cites decisions from Florida's First and Fifth District Courts of Appeal, *Hernando County v. Anderson*, 737 So.2d 569 (Fla. 5th DCA 1999), and *Kirkpatrick v. City of Jacksonville*, 312 So.2d 487 (Fla. 1st DCA 1975). They are not "courts of last resort" in Florida. Any arguable inconsistency falls outside the purview of Rule 10 of this Court. Even so, the cases are distinguishable. In *Hernando County*, *supra*, a billboard company's lease expired. The county acquired the land, then removed and destroyed the billboards in the mistaken belief it had also acquired the billboards and had the right to do so. The county was found liable under inverse condemnation. In the instant case, the record lacks any evidence showing that the City intended to remove the signs permanently or believed it had the right to do so.

In *Kirkpatrick*, *supra*, the City of Jacksonville demolished buildings on private property without notice and, allegedly, without justification. The appellate court ruled that the city could be liable for compensation for inverse condemnation under the Florida Constitution.

In the instant case, the record does not show that the City intended to demolish the signs and does not show that damage to the signs was wilful.

The decision of the Eleventh Circuit is not inconsistent with these cases.

III. The decision does not conflict with this Court's summary judgment standards

For its third argument, Bryan seeks "guidance" from this Court on the application of Rule 56, arguing that the decision of the Eleventh Circuit Court of Appeals conflicts with this Court's summary judgment standards. Bryan contends the City had a burden of proof regarding Mr. Barton's acting only with "mere negligence."

Adickes v. S.H. Kress & Company, 398 U.S. 144 (1970), does not support Bryan's position because the facts and the holding are entirely different. In that case, this Court found an unresolved issue regarding a possible conspiracy between a police officer and employees of a Kress store who had refused to serve food to Adickes and a mixed group of whites and blacks. This Court pointed out that Kress had not submitted any affidavits from two waitresses who had been present and had successfully refused to allow one waitress's deposition to be taken. Kress failed to meet its burden of proof because of what this Court called "gaps" in the materials Kress submitted.

Here, the District Court found no such gaps. The District Court found that the evidence did not support

the allegation of retaliation or that Bryan was targeted, and did not support the allegation that City officials acted with constitutionally invidious motives such as interference with the legitimate exercise of constitutional rights. These findings were based upon a record consisting of affidavits and deposition testimony of City employees and former employees, and Mr. Bryan himself. The City did not refuse to allow any of its employees to have their depositions taken. Bryan has not identified any witness whose testimony might be relevant to the issue of motive but whose testimony is not included in the record. The decision below does not conflict with this Court's summary judgment precedents.

Bryan's argument is not supported by *Daniels v. Williams*, 474 U.S. 327 (1986), which stands for the proposition that the Due Process Clause is not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property. In that case, an inmate sought damages after slipping on a pillow negligently left on a stairway by a sheriff's deputy. The inmate conceded that the jail officer was at most negligent. *Id.*, at 334 n. 3. Whether the officer met his burden of proof under Rule 56 was not an issue in that case.

Here, the City complied with the standard of proof set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This Court's analysis of Rule 56 is that summary judgment is mandated after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial. In such a case, the moving party is entitled to a

judgment as a matter of law. *Id.*, at 322-23. This Court went on to say that the decision in *Adickes*, *supra*, should not be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. Rather, it is sufficient if the moving party "shows" – that is, points out to the district court - that there is an absence of evidence to support the nonmoving party's case. *Id.*, at 325.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). Bryan had to produce definite competent evidence to create a genuine issue of material fact. *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). Bryan failed to do so, and the courts below ruled correctly.

IV. The decision does not conflict with decisions of this Court regarding post-deprivation remedies

Finally, Bryan argues that the decision of the Eleventh Circuit Court of Appeals is a "radical departure" from this Court's post-deprivation remedy cases. Bryan seeks guidance from this Court regarding whether the government's mere inconvenience is sufficient to invoke post-deprivation remedies.

This claim does not appear to be based upon Bryan's "notice and hearing benefit" theory discussed under Point I. The concept of requiring a notice and hearing

before depriving someone of their right to notice and hearing is an absurdity.

Bryan's claim is predicated on his contention that the taking down of the signs by the City's contractor was a "taking." The District Court found that the taking down of the signs was not a taking in the constitutional sense because of a lack of evidence that Bryan was legitimately exercising a constitutionally protected right.

The District Court noted that the evidence did not show, and Bryan did not contend, that the defendants deprived Bryan of the subject billboards, only its unarticulated right, presumably, to display the unpermitted billboards. Even assuming that Bryan had established a protected interest in displaying the billboards on the railroad property, Bryan was given notice and an opportunity to be heard by the code enforcement board, and review of the board's decision by the state's circuit court, thus providing sufficient process post-removal.

Viewing the signs as personal property under the perspective Bryan adopts for this argument, Bryan's claim is based upon damage to the signs negligently inflicted by the contractor at the time the signs were taken down. The record demonstrates no wilful intent on the part of Mr. Barton or other City employees to damage the signs, but merely to allow a contractor to remove them in order to have access to adjoining City-owned property. Notice is not required in advance of an act of negligent damage.

In *Zinermon v. Burch*, 494 U.S. 113 (1990), Burch brought suit after being involuntarily admitted to a state mental hospital and detained for five months. He had been asked to sign consent forms despite being incapable of making an informed decision as to his admission. Florida law provides for a court-ordered evaluation of anyone meeting the criteria for detention and provides a patient with a right to notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent medical examination before involuntary placement. *Id.*, at 122-23. Unlike the instant case, the detention of Burch was not accidental nor was it a negligent by-product of work by a contractor for the state agency.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), where classified civil servants who could be dismissed only for cause had been dismissed without a hearing, this Court held that the employees were entitled to pre-termination process. There was no question but that the employees had a property interest in continued employment. A post-termination appeal to a civil service commission was deemed insufficient. Unlike the instant case, the termination was not accidental nor was it a negligent by-product of work by a contractor for the board of education.

Other cases cited by Bryan are similar in that, in each case, the act was neither accidental nor negligent. *Parham v. J.R.*, 442 U.S. 584 (1979) (where a determination as to admission standards by a neutral physician was required before confinement of a child in a mental hospital); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978) (where a hearing was required

before cutting off utility service); *Goss v. Lopez*, 419 U.S. 565 (1975) (where some kind of notice and some kind of hearing was required before suspension of students from a public school); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (where a hearing was required before the forfeiture of a prisoner's good time credits); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (where a hearing was required before issuance of a writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (where a hearing was required before termination of welfare benefits).

Palazzo v. Rhode Island, 533 U.S. 606 (2001), is a regulatory takings case, in which an inverse condemnation action was brought in state court after applications for the development of waterfront property were rejected. This Court, reviewing a decision of the Supreme Court of Rhode Island, held that the case was ripe because the state agency had made clear its intention to allow no development of the property, but the owner did not suffer a total deprivation of all economic value, and so the case was remanded. In that case, unlike the instant case, the owner had exhausted his remedies in state court before reaching this Court.

Some of the cases cited by Bryan support the City's position.

In *Logan*, *supra*, where Logan had been deprived of the right to maintain a cause of action before an adjudicatory body, the remedy was a hearing before the adjudicatory body. This Court outlined exceptions when a pre-deprivation remedy may not be possible or

practicable, or when the state cannot predict or guard in advance against a deprivation. When any pre-deprivation process is not practicable, a post-deprivation remedy may be adequate. *Id*, at 436.

In *Ingraham v. Wright*, 430 U.S. 651 (1977), a suit brought by the parents of public school students following their disciplinary paddling, this Court affirmed the holding below that the Due Process Clause does not require prior notice and a hearing before the school may impose corporal punishment. This Court held that traditional common-law remedies for excessive corporal punishment under Florida law were fully adequate to afford due process. This Court declined to create a rule requiring a hearing in advance of any paddling, however moderate or trivial. *Id.*, at 680.

In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), where a court issued a writ of sequestration to recover household goods from a defaulting buyer of the goods, but without notice to the buyer and without a hearing, this Court held that issuance of the writ did not violate procedural due process under the Fourteenth Amendment because Louisiana law protected the buyer.

In some cases, post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide. *Parratt v. Taylor*, 451 U.S. 527 (1981) (inmate's claim arising from negligent loss of property); *Daniels*, *supra* (injury caused by mere negligence is not a deprivation within the meaning of the Due Process Clause).

This Court has rejected reasoning that would make of the Fourteenth Amendment a "font of tort law" to be superimposed upon whatever systems may already be administered by the States. *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Due Process Clause does not transform every tort committed by a state actor into a constitutional violation. *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 202 (1989).

The decision of the Eleventh Circuit does not conflict with decisions of this Court regarding post-deprivation remedies.

CONCLUSION

For the foregoing reasons, the Respondents ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER AND OPINION OF THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, PINELLAS COUNTY, FLORIDA, APPELLATE DIVISION DATED DECEMBER 3, 2008

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA APPELLATE DIVISION

Appeal No.: 07-000073AP-88B
UCN: 522007AP000073XXXXCV

BRYAN MEDIA, INC.,

Petitioner,

v.

CITY OF ST. PETERSBURG,

Respondent.

ORDER AND OPINION

THIS MATTER came before the Court on Petitioner, Bryan Media Inc's, Petition for Writ of Certiorari filed December 27, 2007. An Order to Show Cause was issued by this Court on January 11, 2008 and Respondent, City of St. Petersburg, subsequently filed a response. Petitioner seeks review of the November 28, 2007 decision by the Code Enforcement Board (hereinafter "The Board") finding the signs owned by Petitioner were in violation of the City's sign code, as being maintained without a permit.

Appendix

Facts

Petitioner is an outdoor advertising company who owns two adjacent billboards located on a vacant lot at 498 22nd Street S., St. Petersburg. The lot is owned by the City. After giving notice to Petitioner, the Code Enforcement Board held a hearing on November 28, 2007 wherein a City code inspector and a City sign examiner testified on behalf of the City. The code inspector testified the property was originally inspected on August 3, 2004 and re-inspected on September 7, 2004; the matter previously came before the Code Enforcement Board on November 17, 2004. Due to a change in ownership of the property and a later filed internal complaint, the property was re-inspected on August 7, 2007 and again on November 19, 2007. The facts in this case only pertain to Petitioner's October 2, 2007 cited code violation.[1]

The billboards were first erected on the property in July of 1963. Petitioner asserts the billboards were erected before the City required permits. The original lease including all subsequent lease transfers were submitted by Petitioner. In March of 2003, Petitioner obtained ownership through a purchase from Tampa Bay Jr. Posters, Inc. Petitioner argues the current lease can be traced back to the original 1963 lease and therefore, the 1963 City Code is applicable. The 1963 City Code does not require a permit and as such Petitioner argues

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1. Specifically, Chapter 16, Sec. 16.40.120.18 and 16.40.120.3.3.

as the current lease holder, they are grandfathered in and therefore not in violation of the current city code.

Discussion

In review of a quasi-judicial decision by the Code Enforcement Board, the Court is to consider (1) whether the agency afforded procedural due process; (2) whether the agency observed the essential requirements of law; (3) whether competent, substantial evidence supported the agency's findings and judgment. U.S.C.A. Const. Amend. 14., *Powell v. City of Sarasota,* 953 So.2d 5 (Fla.2nd DCA 2006). Petitioner's argument only addresses the second and third prong of analysis.

The record before this Court contains a recorded DVD documenting the testimony presented at the November 28, 2007 Code Enforcement hearing. Also included in the record are the exhibits submitted at the hearing, such as, photographs, correspondence, the applicable lease, copies of the 1963, 1973, 1981, and current City Code, as well as the citation for code violation. This Court relies heavily on the recorded testimony presented at the hearing before the Board. After review, the Court is satisfied that competent substantial evidence supported the Board's findings.

Petitioner argues the Board refused to consider its defenses of equitable estoppel and laches and therefore failed to observe the essential requirements of law. Again, this Court is satisfied the essential requirements of law were not only observed but exhausted. This Court

has also considered the opinion from the United States Appellate Court for the Eleventh Circuit, No. 07-10189, *Bryan Media, Inc. v. City of St. Petersburg* rendered September 12, 2008 in this matter and further affirms the decision by the Code Enforcement Board.

It is hereby:

ORDERED AND ADJUDGED that Petitioner's Writ of Certiorari is denied with prejudice.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this 3 day of December, 2008.

s/ Amy M. Williams
AMY M. WILLIAMS
Circuit Judge, Appellate Division

s/ Peter Ramsberger
PETER RAMSBERGER
Circuit Judge, Appellate Division

s/ J. Thomas McGrady
J. THOMAS MCGRADY
Circuit Judge, Appellate Division